Supreme Court, U.S.
FILED
SEP 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-363

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

DANIEL FOURNIER AND BARBARA FOURNIER,
Petitioners

v.

PETROLEUM HELICOPTERS, INC., *et al.*,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Petition, which consists of nothing more than a complaint about findings of fact of the Trial Court, presents any "special and important reasons" in accordance with Rule 17 of the Supreme Court Rules which governs review of decisions of federal courts of appeals.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Sundstrand, Allison, and Airwork disagree with the Statement of the Case of Petitioners, and specifically adopt the Statement of the Case of Petroleum Helicopters, Inc. which is contained in the Brief in Opposition to Petition for Writ of Certiorari filed by Petroleum Helicopters, Inc. herein.

The very fact that there are disagreements between the parties as to the facts shows that this case does not meet any of the Rule 17 considerations which govern review on certiorari.

As revealed by the opposition brief of Petroleum Helicopters, Inc., the petition in this case is nothing more than a complaint over properly reached findings of fact by the Trial Court. In accordance with Federal Rule of Civil Procedure 52(a), the United States Court of Appeals for the Fifth Circuit held that the findings of fact, based upon oral and documentary evidence, were not clearly erroneous, and the decision of the Trial Court was affirmed.

Because the petitioners only complain about factual findings, the petitioners cannot meet any of the considerations governing review on certiorari which are set forth in Rule 17 and its interpretive jurisprudence and, therefore, the petition for Writ of Certiorari should be denied.

ARGUMENT

In a nutshell, petitioners claim that they are entitled to certiorari because the Trial Court rejected claims of physical and/or psychiatric injuries. As shown in Appendix A of petitioners' brief, a three judge panel of the United States Court of Appeals for the Fifth Circuit specifically reviewed the Trial Court's findings of fact. The Court of Appeals said:

> "We review the district court's findings of fact under the 'clearly erroneous' standard. Fed.R.Civ.P. 52(a). Plaintiffs contend that the court improperly found that the emergency landing was not a crash and that Fournier was not subject to a particularly traumatic experience. The court's findings, however, are supported by the testimony of Blinsky and LeBlanc and by Fournier's own admission to Blinsky and Dr. Kennedy that he was not injured. . . . *We find ample evidence in the record to support the court's factual findings and its conclusion that plaintiffs failed to establish causation, and therefore hold that plaintiffs' challenges to these findings is without merit.*" (Brief of petitioners at A-6). (Emphasis added).

Rule 17 stating "considerations governing review on certiorari" specifically provides:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor."

Rule 17 goes on to spell out three non-exclusive factors for the exercise of the discretion of the Supreme Court, but none of the non-exclusive factors can be stretched to include a simple review of findings of fact by a Trial Court. Indeed, interpretive decisions as well as commentary on Rule 17 have made it clear that the Supreme Court does not grant certiorari to review decisions that turned upon an analysis of facts. In *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178-179, 58 S.Ct. 849, 82 L.Ed. 1273 (1938), the Supreme Court said:

> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." (304 U.S. at 178).

Moreover, in *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503, 71 S.Ct. 453, 95 L.Ed. 479 (1951), the Court said:

> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. *It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony* whereon a conscientious consideration of the entire record, a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations, we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." (340 U.S. at 503). (Emphasis added).

In summarizing the above interpertive jurisprudence of Rule 17, commentators have said:

> "Ordinarily, the Supreme Court will not grant certiorari merely to review evidence or inferences drawn therefrom." 2 *Fed. Proc.* L.Ed. § 3:210 (1981).
>
> * * * *
>
> "An issue of fact is not 'important' for purposes of R.17. Normally, the Court will not grant certiorari to review a decision that turns solely upon an analysis of facts, or to determine whether evidence supports a judgment of district court. . . . As to such issues, the courts of appeal are generally the courts of last resort. . . ." 13 *Moore's Fed. Prac.* 2d Ed., § 817.41 (1988).

The Petition for Writ of Certiorari is based upon nothing more than a complaint as to the findings of fact of the trial court which were affirmed by the Court of Appeals for the Fifth Circuit. As the Brief in Opposition to the Petition for Writ of Certiorari of Petroleum Helicopters, Inc. shows, the trial court and the Court of Appeals for the Fifth Circuit specifically rejected the interpretation of the evidence of petitioners. Inasmuch as petitioners want nothing more than a review of a decision that turns solely upon an analysis of facts, the Petition for Writ of Certiorari should be denied.

CONCLUSION

Sundstrand, Allison, and Airwork join in the Opposition of Petroleum Helicopters, Inc. to the Petition for Writ of Certiorari. The Petition for Writ of Certiorari itself shows that petitioners complain of nothing more than findings of fact.

The findings of fact that are complained about were the result of careful consideration by the Trial Judge, and the findings of fact were subjected to a comprehen-

sive review by the Court of Appeals for the Fifth Circuit which affirmed the Trial Judge's opinion. The Petition for Writ of Certiorari is nothing more than further complaint about factual findings that are amply supported by the record as demonstrated by the United States Court of Appeals for the Fifth Circuit opinion, which is made a part of the Petition for Writ of Certiorari.

Sundstrand, Allison, and Airwork respectfully submit that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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